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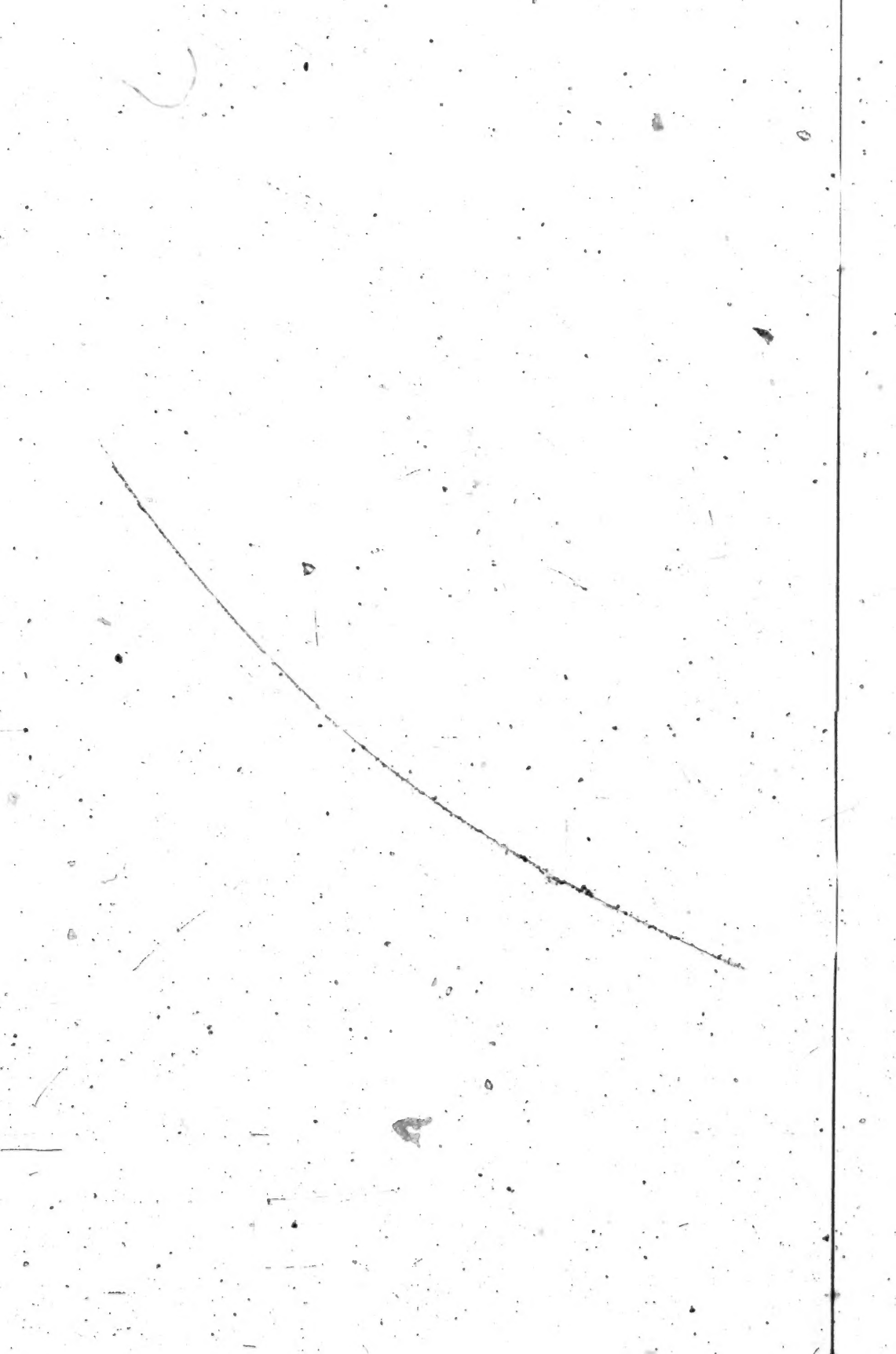

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6048

JOHN ADAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Writ of Certiorari To The Supreme Court of Illinois)

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether *Coleman* v. *Alabama*, 399 U.S. 1 (1970), should be applied retrospectively, and if so, whether it is applicable to a case where the defendant, while represented by privately retained counsel, moved prior to trial to dismiss the indictment for failure of the court to offer him appointed counsel at the preliminary hearing.

STATEMENT OF THE CASE

The petitioner, John Adams, was arrested by Officer Phillip Williams of the Chicago Police Department on January 4, 1967, for engaging in the unlawful sale of narcotics, namely heroin. A preliminary hearing was had on February 10, 1967, and Adams was bound over to the Cook County Grand Jury. An indictment was subsequently returned (R. 3, 4), and Adams' trial commenced before the Honorable Jaques F. Heilingoetter of the Circuit Court of Cook County on May 2, 1967, a jury having been waived (R. 15).

Evidence At Trial And Sentencing

The first witness called by the prosecution was Officer Willis Nance of the Chicago Police Department. He testified that on January 4, 1967, he and Officer Williams met with one Albert Bradley at 1121 South State Street, at approximately 1:30 P.M. Bradley was searched and found to be free of money and narcotics (R. 66). He was given $19 in prerecorded funds, and then driven by Officers Nance and Williams to 18th and Wabash in Chicago where Bradley entered a tavern (R. 66). Bradley returned to the vehicle five minutes later and had a conversation with the officers (R. 67). He left again, and moments later, Officer Nance saw Bradley leave the tavern with the Petitioner, John Adams, and board a bus (R. 68). Both police officers then proceeded to Orleans and Oak Streets in Chicago in accordance with prearranged plans (R. 68-69). When they arrived some 15 or 20 minutes later (R. 88), they saw Adams and Bradley near a drug store at Orleans and Oak streets. The officers had arrived at Orleans and Oak before Bradley and Adams

(R. 87). Officer Nance remained in the squad car and Officer Williams left the car and went into the drug store (R. 69). Officer Williams entered the drug store perhaps a minute before Adams and Bradley entered (R. 91). Officer Nance saw Adams come out of the drug store and walk around the block completely. When he returned to where he had started from, another male Negro appeared on the corner with him (R. 91). The two men crossed the street and started walking south on the east side of the street (R. 71). Officer Nance next saw Adams 15 minutes later after he had been arrested (R. 71-72). Adams was searched, and no marked money or narcotics was found on his person (R. 97).

Albert Bradley next took the stand and testified that his real name was Albert Bradley but that he was also known as Al Nichols (R. 113). He testified that at 1:30 P.M., on January 4, 1967, he went to 1121 South State Street and saw Officers Nance and Williams. They had a conversation, he was searched and found to be free of money and narcotics (R. 114), and he was given $19 in recorded funds (R. 115). They then drove to 18th and Wabash and he entered a tavern called the 57 Club. He contacted the petitioner, Adams, whom he knew only as John Earl, by telephone; Adams' brother placed the call for him (R. 116). On the telephone, Bradley told Adams he wanted to "cop," and Adams said he would be right down (R. 117). Bradley then went back to the parking lot, where Officers Nance and Williams were parked, and told them what he was going to do (R. 118). He then went back to the tavern to wait (R. 119). Adams arrived in 15 minutes (R. 119); Bradley gave him the marked money, and they left the tavern and boarded a bus going to Chicago Avenue (R. 121). At Chicago Ave-

nue, they transfered over to Orleans, and then walked down Orleans to Oak Street and entered a Rexall Drug Store (R. 121). Adams had never left his presence (R. 121). Officer Williams was already in the drug store when they arrived, and he was standing about a foot away from Bradley and Adams (R. 122) at an open telephone booth (R. 124). Adams made another telephone call and said "I'm here," that's all (R. 122-123). Adams then went outside and met with another man (R. 124). They crossed the street, and then Adams beckoned to Bradley (R. 124). Bradley went across the street and received a small tinfoil package (R. 125-127). Adams and Bradley then walked to Chicago Avenue and Orleans, where they were arrested by Officer Williams as they were boarding a bus (R. 125).

On cross-examination, Bradley admitted he was a professional informer (R. 151). He said that it was not a coincidence that he and Adams had gone to that particular Rexall Drug Store; that it was a routine thing (R. 171-172). He knew that Adams was going to make a call from that particular place because he had done it the day before, and Bradley had told Officer Williams this when they were parked at 18th and Wabash (R. 172-173).

Officer Williams then testified for the State. His testimony corroborated that of Albert Bradley and Officer Nance. He said that he and Officer Nance had gone to the Rexall Drugs because it was prearranged that this would be where the informer and defendant would come (R. 188). He testified that he was in the center of the Rexall Drug Store when Adams and Bradley arrived, and that he was standing right next to Adams when Adams made the second telephone call (R. 296). He said that

after Bradley and the defendant left the drug store they started walking south on Orleans Street (R. 178). As they were about to board a bus eastbound on Chicago Avenue, Bradley gave Williams a tinfoil package and indicated he had purchased it from Adams. Williams then placed Adams under arrest (R. 179). A small tinfoil package was then marked People's Exhibit 1-D, and Officer Williams identified it as the one he received from Bradley. It bore Williams' initials (R. 182). It was stipulated that the contents of this package had been tested by a police chemist and found to be heroin (R. 183). It was also stipulated that Adams was 36 years old (R. 189).

Adams then took the stand on his own behalf and denied the charge (R. 241). He testified that he saw Albert Bradley at 12:00 noon on January 4, 1967, at the 57 Club at 18th and Halsted (R. 243). He said that Bradley had called him and told him to come over, that he was "spending up" his money and wanted to buy Adams a drink (R. 243-244). Adams' brother had placed the call for Bradley (R. 267). Bradley then asked Adams to go to the north side with him to find his wife who had left Bradley after an argument (R. 246). Adams did not know why Bradley wanted to look for his wife on the north side (R. 268). He had nothing to do, so he went (R. 246). They took a bus to Chicago Avenue, where Bradley left Adams in a drug store so Bradley could go and "check something out." (R. 249). Bradley was gone 10 to 15 minutes. Bradley did not say where he was going, or that he was looking for his wife and Adams never asked him where he went (R. 271). When they reached Orleans and Oak, Adams said he was cold, and Bradley suggested that they go into the Rexall Drug Store and get warm (R. 250). They were in the store for

10 minutes. Adams called his wife and told her where he was and that he would be home soon (R. 275). Adams was looking out the drug store window when he saw a friend of his named Charlie, who also knew Bradley's wife (R. 253). He went out and talked with Charlie, but he had not seen Bradley's wife either (R. 253). Bradley did not leave the drug store to ask Charlie about his wife (R. 272). Bradley then came out and suggested that they return to the south side (R. 254). Bradley went to a nearby gas station to use the washroom, and when he returned they boarded a bus, but were immediately arrested by Officer Williams (R. 255). Officer Williams told him he looked suspicious and was over here trying to steal something (R. 255). Adams told the arresting police officers that he was on the north side to help Bradley look for his wife (R. 256-257).

The prosecuting attorney then offered into evidence People's Exhibit No. 3, which was proof of the defendant's prior conviction for unlawful sale of narcotics (R. 277).

Albert Bradley was again called by the State in rebuttal. He testified that, contrary to what Adams said, he was not present at the 57 Club between 12:00 and 1:00 P.M. on January 4, 1967, and that he was not buying drinks for everyone at the tavern (R. 280). They left the 57 Club at 2:00 P.M., and Adams never left his presence until Adams went out to meet his contact at Orleans and Oak (R. 281). He never told Adams about any quarrel with his wife. He testified that he had been in that Rexall Drug Store with Adams twice before that occasion, the last time being on January 3, 1967, the day before Adams' arrest (R. 282). Adams never said anything about calling his wife, but merely placed the call

and said, "I'm here." (R. 283). Further, Bradley testified that he never went into a gas station when he and Adams were heading back to the south side (R. 283).

Officer Phillip Williams was called again by the State in rebuttal (R. 295). He testified that when the third party arrived at the area of the corner outside the Rexall Drug Store, he heard Adams say, "There he is." (R. 297). He testified that he did not tell Adams that he was under arrest because he was suspicious looking and might be committing a theft, but told him he "had a sale on him." (R. 297). He testified that he never saw Albert Bradley go into the gas station without Adams (R. 297). He testified that he did not recall Adams saying, when placed under arrest, that he was on the north side looking for Albert Bradley's wife (R. 298).

After final argument by counsel, the court entered a finding of guilty (R. 313). The hearing in aggravation and mitigation disclosed that Adams had previously been convicted of unlawful sale of narcotics (1956), unlawful possession of a hypodermic needle (1960), and two separate offenses of theft (1963, 1965). (R. 314, 315). The court sentenced the defendant to a term of 10 to 13 years in the Illinois State Penitentiary (R. 316).

Pre-Trial Motions

Prior to trial, Petitioner's trial counsel moved to dismiss the indictment against Adams on the ground that the presiding judge at the preliminary hearing failed to appoint counsel to represent Adams during those proceedings (R. 11I-11J). During oral argument on this motion before the trial judge, the prosecution argued that a preliminary hearing was not a critical stage of an Illinois criminal proceeding and thus the appointment

of counsel was not required, relying on the case of *People* v. *Morris,* 30 Ill. 2d 406, 197 N.E. 2d 433 (1964). (R. 43). The trial court agreed, and the motion to dismiss the indictment was denied. (R. 12, 49).

Petitioner's trial counsel also moved prior to trial for a Bill of Particulars (R. 40). In response, the prosecution immediately informed defense counsel that the offense occurred at approximately 2:30 to 3:00 P.M. on January 4, 1967, in the area of Orleans and Clark Streets in Chicago and that the informer's true name was Albert Bradley (R. 41). Thereupon, defense counsel waived the written Bill of Particulars (R. 42-43). This exchange of information occurred on April 28, 1967, four days prior to trial. On that same day, the prosecution made the informer-purchaser, Bradley, available to defense counsel. Further, on that same day the defense answered "ready for trial" (R. 39, 50). At no time did defense counsel request a continuance to investigate further the informer's identity or to prepare more adequately his defense.

Appeal To The Illinois Supreme Court

On appeal to the Supreme Court of Illinois, petitioner raised three issues for consideration. He first argued that the informer-purchaser, Albert Bradley, was intentionally misnamed in the indictment thus depriving him of his right to be informed of the nature of the charge against him. Relying on the cases of *People* v. *Zito,* 237 Ill. 434 (1908), and *Collins* v. *Markley,* 346 F. 2d 230 (7th Cir. 1965) (*enbanc*), the State argued that the illegal sale of narcotics is a "victimless" crime as distinguished from crimes with specific victims such as murder, robbery or rape. As such, the name of the purchaser of the nar-

cotics is not an element of the crime under Illinois law, and thus the failure to name, or to misname, the purchaser does not result in a technical insufficiency in the indictment.

Petitioner also argued that it was error for the judge at the preliminary hearing not to offer him appointed counsel. In response, the State, relying on *People* v. *Bonner,* 37 Ill. 2d 553, 229 N.E. 2d 527 (1967), *cert. denied* 392 U.S. 910 (1968), and *People* v. *Morris,* 30 Ill. 2d 406, 197 N.E. 2d 433 (1964), again argued that a preliminary hearing in Illinois did not constitute a critical stage of a criminal proceeding and thus the failure to offer appointed counsel was not error. It, of course, must be noted that this Court's decision in *Coleman* v. *Alabama,* 399 U.S. 1 (1970), had not yet been rendered at the time of the filing of the State's brief. However, by the time the Supreme Court of Illinois rendered its decision in the instant case, *Coleman* had been decided and the Supreme Court of Illinois specifically held that *Coleman* did not require retroactive application.

Finally, petitioner argued that his guilt was not proved beyond a reasonable doubt. In response, the State argued that the evidence adduced at trial clearly proved Petitioner guilty of the illegal sale of narcotics beyond all reasonable doubt. Not only did the informer, Bradley, testify to all the events constituting the unlawful sale, but his testimony was corroborated in all material respects by the two police officers. The testimony of these three witnesses was contradicted only by the uncorroborated story of the petitioner that Bradley had asked him to help look for his runaway wife.

After hearing oral argument, the Supreme Court of Illinois affirmed petitioner's conviction. *People* v. *Adams,*

46 Ill. 2d 200, 263 N.E. 2d 490 (1970). From this decision, Adams petitioned this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT

This Court's approach to the problem of retrospective decision making has gone through a series of evolutionary stages beginning with its holding in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), that the exclusionary rule announced in *Mapp* v. *Ohio*, 367 U.S. 643 (1961) would be limited to cases on direct review, and culminating in its decision in *Stovall* v. *Denno*, 388 U.S. 293 (1967) where this Court held that the principles announced in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) with respect to the right to counsel at pre-trial lineups would be applicable only to confrontations occurring after the date of decision establishing the right. The rule announced in *Stovall* represents the modern trend in retrospective decision making and should be applied in this case.

Though the relevant standard to be used in determining the retrospective application of a newly announced rule of criminal proceedure has changed, the underlying criteria established in *Linkletter* for deciding whether a new rule should be applied retrospectively in the first place have remained constant. The criteria are three: (a) the purpose to be served by the new standards; (b) the extent of reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards.

Application of the rule announced in *Stovall* v. *Denno* and the criteria established in *Linkletter* v. *Walker* to

the instant case dictates that *Coleman* v. *Alabama*, 399 U.S. 1 (1970) should be restricted to cases in which preliminary hearings were held after June 22, 1970.

In *Coleman*, it was indicated that the purpose to be served by requiring counsel for indigents at preliminary hearings was to protect the accused from being improperly bound over to the Grand Jury, to secure discovery of the state's cases, to fashion an impeachment tool for use at trial, and to make effective arguments on such matters as an early psychiatric examination or bail. These objectives do not require the retrospective application of *Coleman*.

The prevention of the improper binding over of an accused to the Grand Jury and the securing of bail bear no relation to the truth finding process. Furthermore, the preliminary hearing in Illinois is not a dependable source for discovery, impeachment or preservation of evidence, nor does there exist any authority for ordering a psychiatric examination at such hearing.

Nor can there be any doubt that there was substantial reliance on the proposition that counsel was not required at preliminary hearings where neither the acts nor omissions of the accused could be used against him at trial. At least thirty-five states and every Circuit Court of Appeals in this country so relied. This reliance on the old rule was entirely justified in light of this Court's decisions in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963).

Furthermore, the effect on the administration of justice if *Coleman* were to be applied retrospectively would be substantial. In Illinois, alone, literally hundreds of cases in each year prior to 1970 would be affected. The retrospective application of *Coleman* would necessitate hun-

dreds of hearings to determine whether the *Coleman* error was harmless and in many states, such as Illinois, transcripts of preliminary hearings in most cases will not be available.

However, even if this Court should hold that *Coleman* is to be applied retrospectively, it should not be applied to this case. Petitioner was represented by privately retained counsel at trial and there was no allegation in this motion to dismiss the indictment for failure to provide appointed counsel at the preliminary hearing that petitioner was indigent. Furthermore, there was no allegation of harm in any of petitioner's pre-trial or post-trial motions. Nor did petitioner ask that the case be remanded for a delayed preliminary hearing with his attorney. Rather, he asked that the entire indictment be dismissed. Under these circumstances, the trial court cannot be faulted for denying the motion to dismiss.

ARGUMENT

I.

THE APPLICATION OF COLEMAN V. ALABAMA SHOULD BE RESTRICTED TO CASES IN WHICH PRELIMINARY HEARINGS WERE HELD AFTER JUNE 22, 1970

A.

Introduction.

The use of prospective overruling is a new development in criminal cases. Its use in civil cases, though of more ancient vintage, is quite sparse.[1] Despite this novelty, the rules governing the limited retroactivity of judicial decisions developed rapidly.

On June 7, 1965, the Court made its first ruling that qualified the retrospective application of a new decision.[2]

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1. See generally Schafer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U. L. Rev. 631 (1967).

2. The Court had been urged to give full scale consideration to the issue of retrospective application of Gideon v. Wainwright, 372 U.S. 335 (1963) and Douglas v. California, 372 U.S. 353 (1963), but the Court did not do so. See Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963); Daegele v. Kansas, 375 U.S. 1 (1963). The same is true with respect to the application of Griffin v. Illinois, 351 U.S. 12, 25-26 (1956) (concurring opinion); Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (dissenting opinion).

In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), the Court held that the rule excluding illegally seized evidence was limited to cases on direct review at the time the rule was announced and could not be used in a collateral attack upon the validity of a final judgment. It is clear that no more narrow standard of retrospective application was before the Court. 381 U.S. at 622. See also, *Johnson* v. *New Jersey,* 384 U.S. 719, 732 (1966). The Court used the same measure of retrospective application in two other cases. See *Angelet* v. *Fay,* 381 U.S. 654 (1965) (exclusion of illegally seized evidence); *Tehan* v. *Shott,* 382 U.S. 406 (1966) (prohibition of comment upon defendant's failure to testify).

On June 20, 1966, the Court considered for the first time a more narrow standard of retrospective application than that adopted in *Linkletter.* In *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) the Court held that new rules requiring warnings of rights prior to interrogation would be applicable only to cases in which trial began subsequent to the date the new rules were announced.

This new standard of retrospective application was not the result of any new found rationale. The criteria for determining whether a new rule should be prospectively applied have remained basically unchanged since *Linkletter* was announced. "The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[3] The

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3. Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618, 636 (1965); Williams v. United States, 401 U.S. ——, 91 Sup. Ct. 1148, 1152 (1971).

new measure of restricted retrospective application in *Johnson* was adopted because under that measure "law enforcement officers and trial courts will have fair notice that statements taken in violation of [the new confession rules] may not be used." 384 U.S. at 732.

The decision in *Johnson* v. *New Jersey* seemed anomolous in one important respect. The act of reliance by law enforcement officers upon the old rules governing confessions did not occur at the time of the trial, but rather at the time interrogation took place. Certainly the measure of retrospectivity in terms of the timing of trial or review created arbitrary distinctions in individual cases and was largely unrelated to the timing of the act of reliance by law officers. See *Williams* v. *United States,* 401 U.S. ——, 91 Sup. Ct. 1148, 1155 n. 9.

On June 12, 1967, barely more than two years after *Linkletter,* the Court adopted a standard of limited retrospective application that was as consistent with the rationale of prospective overruling as the case or controversy requirement would allow. In *Stovall* v. *Denno,* 388 U.S. 293 (1967), it was held that the right to counsel at pre-trial identification procedures was to be applicable only to confrontations occurring after the date of the decisions establishing the right.

Stovall v. *Denno* represents the end point in a short but complete evolution of the retrospectivity doctrine in which the measure of retrospective application was narrowed until it became consistent with the rationale justifying limited retroactivity. Since *Stovall,* every retrospectivity question before the Court has been resolved in only one of two ways. Either the new rule has been made

fully retrospective[4] or the new rule has been applied only to cases where the prohibited act takes place after the date of the decision which prohibits it.[5]

There have been two exceptions to this consistent pattern. One involved rather special circumstances.[6] The other exceptional case did not present for decision a question of retrospectivity, but rather required interpretation of an existing decision. In *Jenkins* v. *Delaware*, 395 U.S. 213 (1969), the Court held that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was inapplicable to a case being retried after the date of the *Miranda* decision where the original trial occurred prior to *Miranda*. More

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4. Witherspoon v. Illinois, 391 U.S. 510 (1968); Roberts v. Russell, 392 U.S. 293 (1968); McConnell v. Rhay, 393 U.S. 2 (1968); Arsenault v. Massachusetts, 393 U.S. 5 (1968); Berger v. California, 393 U.S. 314 (1969). See Ashe v. Swenson, 397 U.S. 436, 437 n.1 (1970). Cf. United States v. United States Coin and Currency, 401 U.S. ——, 91 Sup Ct. 1041 (1971).

5. De Stefano v. Woods, 392 U.S. 631 (1968); Desist v. United States, 394 U.S. 244 (1969); Kaiser v. New York, 394 U.S. 280 (1969); Halliday v. United States, 394 U.S. 831 (1969); Hill v. California, 401 U.S. ——, 91 Sup. Ct. 1106 (1971); Williams v. United States, 401 U.S. ——, 91 Sup. Ct. 1148 (1971); United States v. White, 401 U.S. ——, 91 Sup Ct. 1122 (1971); See Mackey v. United States, 401 U.S. ——, 91 Sup. Ct. 1160 (1971).

6. Fuller v. Alaska, 393 U.S. 80 (1968) extended application of Lee v. Florida, 392 U.S. 378 (1968), to evidence introduced at trial after the date of the Lee decision. Lee, of course, required the exclusion of evidence secured in violation of a federal wiretap law. Accordingly, Fuller v. Alaska was concerned with consequences of acts by law enforcement officers that had been previously prohibited by a federal statute of many years standing.

importantly, the Court explicitly recognized that its approach to prospective decision making had undergone modification. 395 U.S. at 218, n.7; See also *Desist* v. *United States*, 394 U.S. 244, 252-53 (1969). The Court stated that the more recent trend in prospectivity decisions is to select "the date on which the prohibited practice was engaged in, rather than the date the trial commenced, to determine the applicability of newly formulated constitutional standards" (395 U.S. at 217), and to regard "as determinative the moment at which the discarded standards were first relied upon" (395 U.S. at 218).[7]

It is in light of these now well established measures and rationales that the applicability of *Coleman* v. *Alabama*, 399 U.S. 1 (1970) to this case must decided.

B.

The Purposes Served By The Right To Counsel At Preliminary Hearings Do Not Mandate Retrospective Application of Coleman v. Alabama.

> "Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect."

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7. The Court also quoted with approval the statement that "Sound growth can be promoted and erratic results avoided by focusing attention on the element of reliance that justifies [prospective overruling]". 395 U.S. at 218, n.7. The quotation is taken from an article by Mr. Justice Schaefer of the Court whose judgment is the present subject of review. See Schafer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U. L. Rev. 631, 646 (1967).

Williams v. *United States,* 401 U.S. ——, 91 Sup. Ct. 1148, 1152 (1971).

In *Coleman,* the Court thought that counsel at a preliminary hearing could prevent the unjustified holding or binding of a case to the Grand Jury and make effective arguments for bail. The Court further believed that counsel could, by cross-examination create material for impeachment at trial, secure discovery of the state's case, preserve testimony favorable to the accused and obtain early psychiatric examination of the accused. See *Coleman* v. *Alabama,* 399 U.S. at 9.

Obviously, the prevention of an improper holdover and the securing of bail have no relation to the truth finding aspect of a criminal trial. Indeed, if there were a significant weakness in the state's case at preliminary hearing, defense counsel would rightfully hesitate to bring it clearly to the surface at a preliminary stage of the proceeding for fear that the prosecution would repair the deficiency and refile or go to the Grand Jury.

The remainder of the purposes served by counsel at preliminary hearing may, at least in theory, bear upon the truth finding function at trial. This fact alone, however, does not command retrospective application of the new rule.

The standard is whether the previous absence of a right "substantially impairs [the] truth finding function." *Williams* v. *United States,* 401 U.S. at ——; 91 Sup. Ct. at 1152. And the extent to which a prohibited practice infects the integrity of the truth-determining process at trial is a "question of probabilities." *Stovall* v. *Denno,* 388 U.S. at 298; *Johnson* v. *New Jersey,* 384 U.S. at 729. The Court has also considered the extent to which alternative safeguards exist to serve the pur-

poses of the new rule. See *Johnson* v. *New Jersey,* 384 U.S. at 729.

Obviously there are clear cases on both ends of the spectrum. The illegal seizure of evidence does not affect its reliability and new Fourth Amendment rules have never received full retrospective application. See *Desist* v. *United States,* 394 U.S. at 250. The denial of the right to counsel at trial, on the other hand, must nearly always raise serious questions about the accuracy of guilty verdicts. See *Stovall* v. *Denno,* 388 U.S. at 297-98.

Where the cases are not within these simple areas, this Court has weighed the probabilities and has applied prospectively several rules the violation of which might have affected the reliability of the determination of guilt. The prohibition of comment on the defendant's silence and the right to jury trial were both protective, in part, of the integrity of the guilt-determination. Yet, despite explicit recognition of this, neither applies retrospectively. See *Johnson* v. *New Jersey,* 385 U.S. at 730. The rule requiring warnings of rights prior to interrogation and the right to counsel at certain identification procedures had the obvious purpose of ensuring that the question of guilt be reliably resolved yet the violation of the rules was held not to create a substantial likelihood that the results of many trials were factually incorrect. *Williams* v. *United States,* 401 U.S. ——; 91 Sup. Ct. at 1153-54, n. 7.

Judged by these rules and precedents, the role of counsel at preliminary hearing is not so vital as to require retrospective application of *Coleman.*

The most important function to be served by counsel is the securing of discovery and material for impeach-

ment. The request for a psychiatric examination[8] and the preservation of favorable evidence[9] would be rare occurrences even if defendant were represented by counsel. At the preliminary hearing stages of a case, defense counsel usually has no clear notion of whether psychiatric or any other kind of evidence is likely to be favorable. Even if he suspects such evidence will be helpful, he would be reluctant to commit his client to any particular form of defense without making the kind of thorough investigation that would be difficult to complete before preliminary hearing. Finally, even in the rare case where counsel wants to take affirmative steps at the preliminary hearing, he would be reluctant to do so for fear of giving the state very early notice of his defense. In any event,

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8. Although the Illinois Courts recognize the right of indigents to the services of scientific experts (People v. Watson, 36 Ill. 2d 288; 221 N.E. 2d 645 (1966)) the granting of a motion for a free psychiatrist is not automatic but rests within the discretion of the court. Furthermore, there is no provision for such a motion at the preliminary hearing. Illinois Revised Statutes, Ch. 38, Art. 109. The motion for a psychiatric examination, if made, is ordinarily made after arraignment and then usually under the provisions of Ill. Rev. Stat., Ch. 38, Sec. 104-2(d) which provisions, though applicable to questions of competency, are used also in cases of potential insanity defenses.

9. Most states, though not Illinois, provide for the preservation of testimony by means of evidence depositions. See 5 Wigmore, Evidence, Sec. 138, n.4, n.6 and Sec. 1401-18 (3rd Ed. 1940) and Note, 36 Temp. L. Q. 326, 331 for a collection of statutes. There are no statistics on their use but it is generally believed their use is rare. Certainly reported decisions involving evidence depositions are difficult to find.

the defendant who can show affirmatively that he was prejudiced by the loss of favorable testimony or that early psychiatric examination was vital to his case and was not performed all because of the absence of counsel at preliminary hearing may raise the question under Illinois law regardless of the prospective application of *Coleman* v. *Alabama*. See *People* v. *Bernatowicz*, 35 Ill. 2d 192, 198; 220 N.E. 2d 745, 748 (1966); *People* v. *Bonner*, 37 Ill. 2d 553, 561; 229 N.E. 2d 527, 532 (1967), *cert. denied* 392 U.S. 910 (1968).

In contrast to the highly unusual case where a defendant would require the preservation of favorable evidence or an early psychiatric examination, it may be argued by petitioner that nearly every defendant would seek discovery and the opportunity to create inconsistent statements at the preliminary hearing.[10]

Yet the preliminary hearing is not the best vehicle to achieve these purposes. In explaining 18 U.S.C. § 3060 (1968), the Committee on the Judiciary of the United States Senate observed that:

> "The preliminary hearing does not present an ideal opportunity for discovery. It is designed for another purpose; namely, that of determining whether there is probable cause to justify further proceedings against an arrested person. Thus, the degree of discovery obtained in a preliminary hearing will vary depending upon how much evidence the presiding

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10. It should be noted that pre-trial discovery of the prosecution's case is not required by the Constitution. See Augenblick v. United States, 393 U.S. 348 (1969). The furthest the Court has ever gone is to indicate a potential denial of due process in some cases where defendant is refused any pre-trial discovery of his statements to the police. See Clewis v. Texas, 386 U.S. 707, 712, n.8 (1967).

judicial officer thinks is necessary to establish probable cause in a particular case. This may be quite a bit, or it may be very little, but in either event it need not be all the evidence within the possession of the Government that should be subject to discovery.

'In addition, because it's fundamental purpose is to prevent unjustified restraints of liberty, the preliminary examination should be held within a short time after an accused is first arrested. Discovery, on the other hand, can most usefully take place at a later stage, much closer to trial, when the evidence is more nearly complete and defense counsel is better prepared . . .'" (Report No. 371, 90th Cong. 1st Sess.)

More importantly, Illinois has for many years allowed extensive discovery of the prosecution's case. See Illinois Revised Statutes, Chapter 38, Section 114-2 (bill of particulars); Section 114-9 (list of intended prosecution witnesses); Section 114-10 (production of confessions and lists of witnesses to the confessions); *People* v. *Gerold,* 265 Ill. 448, 107 N.E. 165 (1914); *People* v. *Buzan,* 351 Ill. 610, 184 N.E. 890 (1933).[11] With respect to impeachment of state witnesses, the defendant is entitled to all of their prior statements so long as they are in substantially verbatim form. See *People* v. *Moses,* 11 Ill. 2d 84, 142 N.E. 2d 1 (1957); *People* v. *Wolff,* 19 Ill. 2d 318, 167 N.E. 2d 197 (1959); *People* v. *Johnson,* 31 Ill. 2d 602, 203 N.E. 2d 399 (1964).

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11. Under Illinois Revised Statute, Ch. 38, Sec. 114-13, the Supreme Court of Illinois has the authority to establish discovery procedures by Rule of Court. It is expected that a comprehensive and expanded set of discovery rules will be promulgated at either the June or September 1971 Terms of Court.

The preliminary hearing in Illinois has been particularly unsuitable as a consistent means for fulfilling the purposes that motivated the *Coleman* decision. There is no requirement that preliminary hearings be attended by a court reporter or that a transcript be made.[12] *People* v. *Givans*, 83 Ill. App. 2d 423; 228 N.E. 2d 123 (1967); *People* v. *Ritchie*, 36 Ill. 2d 392, 396-97, 222 N.E. 2d 479 (1967). See *People* v. *Morris*, 30 Ill. 2d 406, 412; 197 N.E. 2d 433 (1964) (Schaefer, J. concurring). Probable cause may be determined on the basis of hearsay. *People* v. *Veldez*, 72 Ill. App. 2d 324; 214 N.E. 2d 675 (1966); *People* v. *Jones*, 75 Ill. App. 332; 221 N.E. 2d 29 (1966).[13] The hearing judge may terminate the proceedings once probable cause is established. *People* v. *Bonner*, 37 Ill. 2d 553, 560, 229 N.E. 2d 527, 531 (1967), *cert. denied* 392 U.S. 910 (1968). The defendant has no right to have a preliminary hearing.[14] *People* v. *Petruso*, 35 Ill. 2d 578, 221 N.E. 2d 276 (1966). Presumably, since the Court can terminate the proceeding once probable cause is established, the defense can be precluded from calling witnesses of its own. In short, the preliminary hearing in Illinois is not a dependable source of discovery, impeach-

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12. Other than in Cook County, the vast majority of preliminary hearings in Illinois are not attended by court reporters.

13. The rationale is that whatever is admissible before the grand jury is similarly admissible in preliminary hearings. See People v. Jones, 19 Ill. 2d 37, 166 N.E. 2d 1 (1960) and Costello v. United States, 350 U.S. 359 (1956) (scope of evidence before grand jury).

14. The 1970 Constitution of the State of Illinois (effective July 1, 1971) does establish a right to a preliminary hearing. See Article I, Sec. 7.

ment or preservation of evidence and there exists no authority to order psychiatric examination at such a hearing.[15]

The petitioner argues that *Coleman* must be retrospective for two reasons. First, he asserts that the evidence in this case was weak. (Petr's Brief A, Par. 13) The record does not, read as a whole, support this contention. By resting his argument on the particular state of the record in his case, he really concedes implicitly that it is not the general rule of *Coleman* he invokes. Rather, petitioner is saying that his case cannot stand because, in the particular circumstances, he was prejudiced by the absence of counsel. This is not an argument founded on *Coleman* v. *Alabama* but rather on *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963). That argument must fail, as petitioner well knows, because he never alleged any specific prejudice in the court below and never made, nor sought to make, any showing of what counsel might have done at the prelim-

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15. In one respect, the preliminary hearing in Illinois is fairly broad because the defense can move to suppress evidence, a motion not available in federal cases. Compare Ill. Rev. Stat. Ch. 38, Sec. 109-3(e) with Giordenello v. United States, 357 U.S. 480, 484 (1958). In some cases this may lead to some discovery, but most often the evidence on the preliminary hearing motion to suppress is purely hearsay and there is little incentive to develop the issue since the ruling at the preliminary motion has no binding effect. See Ill. Rev. Stat. Ch. 38, Sec. 109-3(e). Parenthetically, it might be noted that the retrospectivity of all exclusionary rules affects discovery in a collateral way. Requirements of standing and the elimination of the mere evidence rule diminish the necessity of motions to suppress and its attendant element of discovery. The application of new exclusionary rules has the reverse effect.

inary hearing to improve his position at trial.[16] It is manifest that the particular strength or weakness of a given record is irrelevant to the issue of whether *Coleman* should be given general retrospective application.

The petitioner's second argument is simply that *Coleman* involves the right to counsel. (Petr's Br. A. par. 4). Nothing, however, is clearer than the proposition that retrospectivity "is not automatically determined by the provision of the Constitution on which the dictate is based." This clear proposition comes from two decisions which held, respectively, that the right to counsel at interrogation and at line-ups was not retrospective. See *Johnson* v. *New Jersey*, 384 U.S. at 728; *Stovall* v. *Denno*, 388 U.S. at 297.

By comparison to the purposes served by the right to counsel established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967), the purposes served by the *Coleman* right to counsel are hardly of greater significance in relation to the reliability of guilty determination. Indeed, there are strong analogies between the *Wade-Gilbert* doctrine and the *Coleman* doc-

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16. The obvious allegation in this regard would concern the lack of cross-examination of the purchaser of narcotics, but the purchaser did not testify at preliminary hearing and there was no obligation on him to do so. In any event, Illinois has always provided a remedy for any specific prejudice shown from lack of counsel at the preliminary hearing. (See People v. Bonner, 37 Ill. 2d 553, 561; 229 N.E. 2d 527, 532 (1967), cert. denied 392 U.S. 910 (1968), and there exists a procedure for establishing further facts to support the claim of specific prejudice, Ill. Rev. Stat. Ch. 38, Sec. 122.

trine, analogies recognized by the Court in *Coleman*. See 399 U.S. at 7. The willingness of the Court to recognize the doctrine of harmless error with respect to violations of *Coleman* and *Wade* is another common feature and one that distinguishes them from other right to counsel cases. In *Phillips* v. *North Carolina*, 433 F. 2d 659, 662 (4th Cir. 1970), the Court held that *Coleman* was to be applied prospectively and stated:

> "To be sure if a preliminary hearing is held the accused gains important rights and advantages that can be effectively exercised only through his attorney. Counsel's function, however, differs from his function at trial. Broadly speaking, his role at the preliminay hearing is to advise, observe, discover the facts, and probe the state's case. In this respect he serves in somewhat the same capacity as counsel at lineups and interrogations, which are both pretrial stages of criminal proceedings where the right to counsel has not been held retroactive."

The analogy goes further still because a violation of *Coleman* like a violation of *Wade-Gilbert* does not necessarily mean that either the preliminary hearing or the line-up involved was, in fact, unfair. The blanket effect that *Coleman* would have on cases in which trial was perfectly fair[17] has been a prime factor in persuading courts to decline to apply *Coleman* retrospectively. See

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17. "The probability that the truth determining process was affected by the lack of counsel at preliminary hearings is minimal in the vast majority of cases. Most witnesses' stories at the preliminary hearing remain the same at trial. Testimony favorable to the accused is usually not available at the preliminary stage of the proceeding for counsel to preserve. Discovery is also unlikely at such an early stage of the proceedings since the Commonwealth has always been very reluctant to open its case before trial." Commonwealth v. Brown, 217 Pa. 190, 269 A 2d 383, 386 (1970).

Phillips v. *North Carolina*, 433 F. 2d 659, 662 (4th Cir. 1970); *United States ex rel. Bonner* v. *Pate*, 430 F. 2d 639 (7th Cir. 1969); *Konvalin* v. *Sigler*, 431 F. 2d 156 (8th Cir. 1970).

It appears that insofar as "purpose" is concerned, the doctrine of *Coleman* falls well within the parameters set by *Stovall* defining what doctrines may be applied prospectively. Beyond this, we believe a consideration of the factors of reliance and effect on the administration of justice will show that *Coleman* should be applied prospectively.

C.

There Was Substantial Justified Reliance On The Proposition That Counsel Was Not Required At Preliminary Hearings Where Neither The Acts Nor The Omissions Of Defendant Could Be Used Against Him At Trial.

In *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), the Court held that arraignment in Alabama was critical because certain rights must be asserted at arraignment or lost forever. The Court held that such a critical proceeding required appointment of counsel but recognized that under the various state laws arraignment could be structured so as to be non-critical, 368 U.S. at 54, N. 4.

In *White* v. *Maryland*, 373 U.S. 59 (1963) the petitioner's uncounselled plea of guilty at a preliminary hearing was used against him at trial and the Court held that, in such circumstances, the preliminary hearing was critical and counsel was required. The taking of a plea was the crucial factor. 373 U.S. at 60.

Hamilton and *White* when read together stated a coherent rule. The States could not bind a defendant at trial by his failure to object or raise an issue at a prelim-

inary state when the right to counsel had not been extended to him. Nor could the States use his admissions at trial if they were made at such a preliminary proceeding. The rule protected defendants from suffering at trial the consequences of their uncounselled acts and omissions at preliminary hearings. Accordingly, it seemed clear that if the States created a total insulation of the preliminary hearing from the trial, the *Hamilton-White* rule would be satisfied.

The nature of the proceedings involved in *Hamilton-White* "is fundamentally different from the preliminary hearings . . . in Coleman." *Phillips* v. *North Carolina*, 433 F. 2d 659, 661 (4th Cir. 1970).

This clear logical distinction between the preliminary proceedings in *Hamilton-White* and the typical preliminary hearing in Illinois was specifically relied upon by the Supreme Court of Illinois. See *People* v. *Morris*, 30 Ill. 2d 406, 410-412; 197 N.E. 2d 433 (1964); *People* v. *Bonner*, 37 Ill. 2d 553, 558-59, 229 N.E. 2d 527 (1967), *cert. denied*, 392 U.S. 910 (1968). In turn, the opinion in *People* v. *Morris* was relied upon by the trial court below.

Illinois was not alone in its reading of the applicable standards. Thirty-three jurisdictions made similar rulings.[18]

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18. Alabama: Coleman v. State, 211 So. 2d 917, 44 Ala. App. 429 (1968), *rev'd*, Coleman v. Alabama, 399 U.S. 1 (1970); Alaska: Merrill v. State, 423 P. 2d 686 (Alaska 1967), *cert. denied* 386 U.S. 1040 (1967); Arizona: State v. Miranda, 104 Ariz. 174, 450 P. 2d 364 (1969), *cert. denied* 396 U.S. 868 (1969); California: People v. Bryan, 3 Cal. App. 327, 83 Cal. Rptr. 291 (1970); Connecticut: United States ex rel. Cooper v. Reincke, 333 F. 2d 608 (2d Cir. 1964), *cert. denied*, 379 U.S. 909 (1964); Florida:

The petitioner argues that such reliance was unjustified after *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The petitioner's argument is specious. *Miranda* was fully in accord with the concept. If counsel was denied at interrogation, then the defendant's statements could not be used at trial. This sort of rule is completely consistent

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Montgomery v. State, 176 So. 2d 331 (Fla. 1965), *cert. denied*, 384 U.S. 1023 (1966); Georgia: Malignaro v. Balkcom, 221 Ga. 150, 143 S.E. 2d 748 (1965); Idaho: Freeman v. State, 87 Ida. 170, 392 P. 2d 542 (1964); Kansas: Ray v. State, 202 Kan. 144, 446 P. 2d 762 (1968); Kentucky: Howard v. Commonwealth, 446 S.W. 2d 293 (Ky. 1969); Maine: Nadeau v. State, 232 A. 2d 82 (Me. 1967), *vacated on rehearing*, 247 A. 2d 113 (Me. 1968); Maryland: Wallace v. State, 9 Md. App. 131, 262 A. 2d 789 (1970); Tyler v. State, 5 Md. App. 265, 246 A. 2d 634 (1968); Massachusetts: Commonwealth v. O'Leary, 347 Mass. 387, 198 N.E. 2d 403 (1964); Mississippi: Allred v. State, 187 So. 2d 28 (Miss. 1966); Missouri: State v. Ussery, 452 S.W. 2d 148 (Mo. (1970); Nebraska: State v. Sheldon, 179 Neb. 377, 138 N.W. 2d 428 (1965), *cert. denied*, 383 U.S. 930 (1966); Nevada: Payne v. Warden, Nevada State Prison, 85 Nev. 648, 461 P. 2d 406 (1969); New Hampshire: State v. Chase, 109 N.H. 296, 249 A. 2d 677 (1969); New Jersey: State v. Hale, 45 N.J. 225, 212 A. 2d 146 (1965), *appeal dismissed, cert. denied*, 384 U.S. 884 (1966); New York: People v. Smith, 29 A.D. 578, 285 N.Y.S. 2d 549 (1967); North Carolina: Gasque v. State, 271 N.C. 323, 156 S.E. 2d 740, *cert. denied*, 390 U.S. 1030 (1967); North Dakota: State v. Starratt, 153 N.W. 2d 311 (N.D. 1967); Ohio: Tabor v. Maxwell, 3 Ohio St. 2d 106, 209 N.E. 2d 206 (1965); Oklahoma: Dorrough v. State, 452 P. 2d 816 (Okla. Crim. 1969), Speer v. Page, 466 P. 2d 624 (Okla. Crim. 1968); Pennsylvania: Commonwealth v. Frye, 433 Pa. 473, 252 A. 2d 580 (1969), *cert. denied*, 396 U.S. 932 (1969); Rhode Island: State v. Nettis, 78 R.I. 489, 82 A. 2d 852 (1951); South Carolina: State v. Redding, 252

with *Hamilton* and *White* and there is nothing in *Miranda* to suggest that anything more than insulating the trial from the products of a pre-trial counselless proceeding was required.

There was, in short, no clear foreshadowing of the *Coleman* rule. No prior decision had announced the rule in *Coleman* and the reliance on the *Hamilton-White* rule was substantial. See *Phillips* v. *North Carolina*, 433 F. 2d 659 (4th Cir. 1970); *Konvalin* v. *Sigler*, 431 F. 2d 1156 (8th Cir. 1970); *Commonwealth* v. *Brown*, 217 Pa. Super. 190, 269 A 2d 383 (1970) *Locke* v. *Erickson*, 181 N.W. 2d 100 (S.D. 1970).

Finally, it is clear that the reliance of the States was not based solely upon State precedents. Every Circuit Court of Appeals in this country had held that there was no federal constitutional requirement for counsel at the type of preliminary hearings where rights cannot be sacrificed or lost. *Pagan Cancel* v. *Delgado*, 408 F. 2d 1018

S.C. 312, 166 S.E. 2d 219 (1969), *cert. denied*, 397 U.S. 940 (1970); South Dakota: State v. Jameson, 78 S.D. 431, 104 N.W. 2d 45 (1960); Tennessee: Schoonover v. State, 448 S.W. 2d 90 (Tenn. Crim. App. 1969); Texas: Branch v. State, 445 S.W. 2d 756 (Tex. Crim. App. 1969); Utah: Crouch v. State, 24 Utah 2d 126, 467 P. 2d 43 (1970); Virginia: Duffield v. Peyton, 209 Va. 178, 162 S.E. 2d 915 (1968); Washington: State v. Callas, 68 Wash. 2d 542, 413 P. 2d 962 (1966), *cert. denied*, 390 U.S. 970 (1968); West Virginia: Raleigh v. Coiner, 302 F. Supp. 1151 (N.D. W. Va. 1969); Martin v. Coiner, 299 F. Supp. 553 (S.D. W. Va. 1969).

A survey conducted by Respondent of states without recently reported cases on the subject revealed that the states of Montana and Arkansas also relied heavily on the old rule.

(1st Cir. 1969); *United States ex rel. Cooper v. Reincke*, 333 F. 2d 608 (2d Cir. 1964), *cert. denied*, 379 U.S. 909, (1964); *United States ex rel. Budd* v. *Maroney*, 398 F. 2d 806 (3d Cir. 1968); *DeToro* v. *Pepersack*, 332 F. 2d 341 (4th Cir. 1964), *cert. denied*, 379 U.S. 909 (1964); *Walker* v. *Wainwright*, 409 F. 2d 1311 (5th Cir. 1969), *cert. denied*, 396 U.S. 894, (1969); *Waddy* v. *Heer*, 383 F. 2d 789 (6th Cir. 1967), *cert. denied*, 392 U.S. 911 (1968); *Butler* v. *Burke*, 360 F. 2d 118 (7th Cir. 1966), *cert. denied*, 385 U.S. 835, (1966); *Pope* v. *Swenson*, 395 F. 2d 321 (8th Cir. 1968); *Wilson* v. *Harris*, 351 F. 2d 840 (9th Cir. 1965), *cert. denied*, 383 U.S. 951, (1966); *Latham* v. *Crouse*, 320 F. 2d 120 (10th Cir. 1963), *cert. denied*, 375 U.S. 959, (1963); *Headen* v. *United States*, 115 U.S. App. D.C. 81, 317 F. 2d 145 (1963).

Under these circumstances, the contention that the State trial courts should have known that counsel at preliminary hearing was an absolute requirement is meritless.

D.

The Effect On The Administration Of Justice Of A Retrospective Application Of Coleman v. Alabama Would Be Substantial And Highly Undesirable.

In the third section of his brief, petitioner virtually concedes that application of *Coleman* v. *Alabama* should have only limited retrospective application. He argues that *Coleman* should be applied only to cases in which defendants objected to the absence of counsel at preliminary hearing prior to trial. He states bluntly that "all other defendants, by proceeding to trial with a lawyer

waived the point."[19] Then petitioner concludes that, viewed in this perspective, *Coleman's* effect on past cases is minimal. Petitioner has been able to find only six cases other than his own where the issue was raised in the trial court in Illinois.

The petitioner's attempt to limit the retrospective effect of *Coleman* proceeds from his realization that to advocate full retrospectivity is to advocate chaos. His argument is, of course, inconsistent with his confident claim that after *Miranda* v. *Arizona*, 384 U.S. 436 (1966) the right to counsel at preliminary hearings was perfectly clear. Obviously, it was not so very clear for if it were, petitioner would find far more than six reported cases where the issue was raised in the trial court.

Unfortunately, there can be no measure of the number of cases which a fully retrospective application of *Coleman* would affect in Illinois. The reason for this is the variation in local practice. Illinois, like many other states, provides counsel at preliminary hearings on an irregular and unpredictable basis. There is a wide variation among the counties on the appointment of counsel and, even within single counties, the practice may vary. There would be hundreds of cases for each year in Illinois prior to 1970 in which counsel was not provided at preliminary hearing and the further back the year, the larger the

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19. The attorneys for the respondent are also attorneys for the wardens of the various state penal institutions and bear the responsibility for responding to petitions for habeas corpus relief. It is more than slightly tempting to indorse petitioner's "waiver" rule if there were any assurance that it would apply generally to federal review of state convictions.

number of cases. As recently as 1965 approximately two-thirds of the states did not appoint counsel for preliminary hearings. ABA, Standards Relating To Providing Defense Services, 44 (Approved Draft 1968). Until 1964, the federal courts did not provide counsel. See 18 U.S.C. 3006 A(b) (1964). There can hardly be any question that the effect of a retrospective application of *Coleman* would affect far more cases than would the retrospective application of *Griffin* v. *California*, 380 U.S. 609 (1965) or *Katz* v. *United States*, 389 U.S. 347 (1967). See *Desist* v. *United States*, 394 U.S. 244, 251 (1969). In several jurisdictions, the gravity of a retrospective application has been explicitly recognized. See *Phillips* v. *North Carolina*, 433 F. 2d 659, 663 (4th Cir. 1970); *State* v. *Riley*, 100 Ariz. 318, 475 P. 2d 932 (Ariz. 1970); *Docke* v. *Erickson*, 181 N.W. 2d 100 (S.D. 1970). One Court of Appeals has said that a retrospective application of *Coleman* "would be the genesis for literally hundreds of post-conviction evidentiary hearings which in sheer numbers would virtually shatter the bounds of reality." *Konvalin* v. *Sigler*, 431 F. 2d 1156, 1160 (8th Cir. 1970).

The retrospective application of *Coleman* would present further special problems. If *Coleman* were to be applied to all past cases, it would require that evidentiary hearings be held to determine whether the *Coleman* error was harmless. *Coleman* v. *Alabama*, 399 U.S. at 10-11. In many cases, as in much of Illinois, no transcript of the preliminary hearing will be available. See *Phillips* v. *North Carolina*, 433 F. 2d 659, 663 (4th Cir. 1970). Even where the record was available the issue could not be resolved by consideration of the record alone. Fact determinations concerning matters transpiring years earlier would be required frequently. And there would be the further necessity of determining whether, in light of du-

bious reconstructions of facts, the error at the preliminary hearing "tainted" the trial. The Court has previously frowned on the necessity for requiring such excessively subtle resolutions of taint issues years after the fact. See *Desist* v. *United States*, 394 U.S. 244, (1969); *Stoval* v. *Denno*, 388 U.S. 293, 300 (1967).

E. Conclusion.

The failure to provide counsel at the preliminary hearing below did not, of course, constitute knowingly unconstitutional conduct. There is therefore no reason to apply *Colema* v. *Alabama* to this case merely because it is pending on direct review. See *Desist* v. *United States*, 394 U.S. 244, 254 (1969). Instead, the *Coleman* rule should be applicable only to those cases in which the preliminary hearing was held after the date of the *Coleman* decision.

The Supreme Court of Illinois, whose thoroughness and care in this case petitioner does not challenge, held that *Coleman* v. *Alabama* should not apply retrospectively. Its judgment in this regard has been echoed by every court that has had to decide the issue. See *Olsen* v. *Ellsworth*, 438 F. 2d 630 (9th Cir. 1971); *Brown* v. *Craven*, 438 F. 2d 334 (9th Cir. 1971); *Phillips* v. *North Carolina*, 433 F. 2d 659 (4th Cir. 1970); *Harris* v. *Neil*, 437 F. 2d 63 (6th Cir. 1971); *Konvalin* v. *Sigler*, 431 F. 2d 1156 (8th Cir. 1970); *United States ex rel. Bonner* v. *Pate*, 439 F. 2d 639 (7th Cir. 1970); *Noe* v. *Cox*, 320 F. Supp. 849 (W.D. Va. 1970); *Crow* v. *Coiner*, 323 F. Supp. 555 (N.D. W. Va. 1971); *Akins* v. *State*, 243 So. 2d 385 (Ala. Crim. App. 1971); *State* v. *Riley*, 106 Ariz. 318, 475 P. 2d 932 (1970); *Billings* v. *State*, 10 Md. App. 31, 267 A. 2d 808 (1970); *State* v. *Gaffey*, 457 S.W. 2d 657 (Mo. 1970); *State* v. *Chapman*, 465 S.W. 2d 472 (Mo. 1971); *State* v. *Dutton*,

112 N.J. Super 402, 271 A. 2d 593 (1970); *Commonwealth* v. *James*, 440 Pa. 205, 269 A. 2d 383 (1970); *Commonwealth* v. *Brown*, 217 Pa. Super. 190, 269 A. 2d 383 (1970); *Locke* v. *Erickson*, 181 N.W. 2d 100 (S.D. 1970).

We ask that its judgment now be affirmed.

II.

COLEMAN V. ALABAMA SHOULD NOT BE APPLIED TO THIS CASE EVEN IF IT IS HELD TO BE FULLY RETROSPECTIVE.

The protection of *Coleman* v. *Alabama*, 399 U.S. 1 (1970) is intended for the indigent defendant who is unable to realize on his own the advantages of an attorney's assistance. 399 U.S. at 9-10. The petitioner in this case was represented by privately retained counsel. It was only for purposes of appeal and, of course, after trial that petitioner availed himself of the right to appointed counsel. Further, the petitioner's motion to dismiss the indictment, drafted by his attorneys, did not allege indigency. Under these conditions the petitioner has not sustained his burden of proving his inability to hire an attorney at the preliminary hearing. It is clear that petitioner must meet this burden. See *Kitchens* v. *Smith*, 401 U.S. ——; 91 Sup. Ct. 1089, 1090 (1971).

Furthermore, the petitioner never made an allegation of harm either in his pre-trial motion to dismiss or in his post trial motions. Surely if any harm had occurred, it would have been most apparent and easiest to prove at that time. The unjustifiable absence of any allegation of harm at the trial level should preclude the granting of relief under *Coleman*.

Finally, the petitioner sought an unwarranted remedy, to wit, dismissal of the indictment. At best, petitioner would have been entitled to a delayed preliminary hearing or to a hearing to show irreparable harm. He sought neither, but instead asked the trial court to dismiss the indictment without any showing of harm. Under the circumstances, the trial court cannot be faulted for denying the motion to dismiss.

CONCLUSION

The State of Illinois respectfully requests that the judgment of the Supreme Court of Illinois be affirmed.

Respectfully submitted,

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